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The Lisbon Treaty: A Constitutional Document, Not a Constitution—A British Perspective

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1. Introduction

The European Union¹ has undergone a constitutional transformation in the past half century. It has evolved from its origins as the European Economic Community, promoting economic integration, into a supranational polity that has come to be perceived in constitutional and even federal terms. This paper will explore the extent to which the modern-day EU can be said to possess some sort of constitution. In doing this, it will be necessary to decouple such a constitution from the notion of state constitutionalism and instead define it as a unique transnational constitution. Despite this, useful comparisons can be drawn between state constitutions and that of the EU, in order to ascertain the form the latter may take. Particularly useful in this regard is the analogy between the British constitutional model and the EU constitution. This paper concludes that the EU possesses a composite² constitution more akin to that of the United Kingdom rather than a formal written text, as is typical in continental Europe. As such, in the present writer's view, the Lisbon Treaty would feature, along with the other treaties, as a constitutional document within the constitutional arrangements of the EU, without it becoming a formal constitution itself.

1. The Nature of a Constitution

Firstly, it is important to define what is meant by a constitution within the specific context of the EU. The dictionary defines a constitution as being 'a body of fundamental principles or established precedents according to which a state or organization is governed.'³ However, a constitution is more than this rather formalistic definition suggests. As well as being a legal concept, constitutionalism also has a certain political impact.⁴ Paine suggests

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¹ Henceforth known as the EU.

² Composed of both written and unwritten sources.

³ *Shorter Oxford English Dictionary* (5th Edition OUP, Oxford 2002).

⁴ R Bellamy and D Castiglione, 'Introduction: Constitutions and Politics' in R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives*, (Blackwell Publishers, Oxford 1996).

that a constitution is a written document, which both displays certain formal characteristics and is publicly recognisable.⁵ This positivist conception of a constitution seems overly formalistic and ignores the fundamental place a constitution holds in society as distinct from other laws. The constitutional principles that a state represents must be distinguished from the constitutional text or individual constitutional documents which embody them.⁶

The constitutional text accords with the dictionary definition of a constitution and that advanced by Paine. It is the constitutional text that must be formally valid and regulate the exercise of public power in a positivistic manner. This finds support in the instrumental view of a constitution as a superstructure for the maintenance of an independent normative order.⁷

This, however, is merely the legal manifestation of a more fundamental legal/political concept. Normative conceptions consider the constitution as a fundamental norm upon which the whole organisation of socio-political life must ultimately depend.⁸ Therefore, two distinct elements can be identified that must be present in order to classify a given set of laws as a constitution. Firstly, the rules must regulate the exercise of political power in a given political entity and secondly they must be seen as embodying the fundamental basis of society within the polity. The validity of the former is assessed on the basis of Kelsen's positivist explanation of the basic norm in terms of formal legitimacy.⁹ The validity of the latter, on the other hand, is assessed with reference to social or substantive legitimacy.¹⁰

2. *The Existence of Supranational Constitutionalism*

Our current understanding of the nature of a constitution is very much influenced by nineteenth-century constitutionalism and the liberalist view of

⁵ T Paine, *Political Writings*, (CUP, Cambridge 1989) at p. 81.

⁶ C Schmitt, *Verfassungslehre*, (Duncker u. Humblot GmbH, Berlin 2002) ch. 1, para. 2.

⁷ FA Hayek, *Law, Legislation and Liberty, volume 1: Rules and Order*, (University of Chicago Press, Chicago 1973).

⁸ D Castiglione, 'The Political Theory of the Constitution' in R Bellamy and D Castiglione (n 4).

⁹ M Hartney (tr), H Kelsen, *General Theory of Norms*, (Clarendon Press, Oxford 1991) at pp.116-117.

¹⁰ Essentially this is where the members of society accept the laws of that society as binding and comply with them. Weiler suggests that substantive legitimacy, at least at the level of the state, is where 'a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same *Volk...*' JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) *European Law Journal* 219 at p.228; see also Hurrelmann who argues that 'a number of *social preconditions* [such as social integration] can thus be defined that have to be met in order to secure the normative legitimacy [or substantive legitimacy] and empirical acceptance of democratic institutions. A Hurrelmann, 'European Democracy, the 'Permissive Consensus' and the collapse of the EU Constitution' (2007) *European Law Journal* 343 at p. 348.

the nation state.¹¹ The essence of this liberal constitutionalism is of government grounded in, limited by, and devoted to the protection of individual rights.¹² The Peace of Westphalia of 1648 announced the dawn of the European (nation) state and a new system of spatial organisation that was founded in the naturalness of state sovereignty.¹³ It is on this basis that our ideas about what constitutes a constitution have evolved. It is, however, important to note that any discussion of constitutionalism beyond the state should not merely be an attempt to define transnational constitutionalism with reference to state constitutionalism. Instead, the constitutional discourse about post-state spaces needs to be attuned to the idiosyncrasies of such orders.¹⁴

As a result of globalization and the increasing inter-dependence of global economies, states, more and more, need to devise ways to regulate their mutual interactions on the international level. This allows for the possible existence of a positivist type constitution as described above, namely a formally valid set of rules that governs the exercise of power within the organisation. Whilst this may be all that exists on the broader international plane, it does not preclude a more intense type of constitutionalism on a post-state, sub-global level. The existence of a *demos*¹⁵ is seen as a prerequisite of the existence of a state constitution.¹⁶ Therefore, the lack of a *demos* at the international level is seen as precluding the existence of a transnational constitution.¹⁷ This, however, is not necessarily the case because transnational constitutionalism may be more about normative neutrality and accommodation of differences than about projection of a common value system.¹⁸

3. *The Constitution of the European Union*

It is important to distinguish the European Union both from a state and a classical intergovernmental organisation. In terms of its constitution, the European Union is distinct from both of these entities.¹⁹ The EU is an entity within the international legal order, created by states which inhabit that legal order. However, these states share common principles such as peace, human rights, democracy and the rule of law. It is these principles that

¹¹ D Castiglione (n 8).

¹² Hesse and Johnson (eds), *Constitutional Policy and Change in Europe*, (OUP, Oxford 1995) at p.34.

¹³ Curtin, *Post national democracy: The European Union in Search of a Political Philosophy*, (Kluwer Law International, The Hague 1997) at p.2.

¹⁴ N Tsagourias, 'Constitutionalism: a Theoretical Roadmap' in N Tsagourias (ed), *Transnational Constitutionalism*, (CUP, Cambridge 2007) at p.5.

¹⁵ A *demos* is a people united by a common culture and heritage.

¹⁶ *Brunner* [1994] 1 CMLR 57 (German Maastricht Decision).

¹⁷ Grimm, 'Does Europe Need a Constitution' (1995) 1 *European Law Journal* 282.

¹⁸ N Tsagourias (n 14) at p.6.

¹⁹ N Tsagourias, 'The Constitutional Role of General Principles of Law in International and European Jurisprudence', in N Tsagourias (ed), *Transnational Constitutionalism*, at p. 87.

define the EU as a distinct legal order within the international legal order; attribute legitimacy; ensure legal coherence; foster unity; and provide orientation.²⁰ Unlike international law, the European legal order affects individuals directly, rather than through their states.²¹ There is also a mutual interaction between the national and European legal orders which leads to a Europeanization of national law and a domestication of European law.²² All of the above has allowed the European Union to grow an indigenous constitution and claim constitutional autonomy.²³ In this context, 'constitution' does not mean a formally valid written document, but rather a set of fundamental principles that govern the exercise of power within the EU and regulate the interaction between EU institutions and member states.

4. *The British Constitution*

Having already demonstrated that the EU possesses a constitution, it is now appropriate to define the nature of this constitution. Whilst it is true that the legitimacy of such a constitution must be conceived of in non-statal terms, it is useful to draw analogies with existing state constitutions to inform our conceptions of the structure of the EU's constitution. Particularly helpful in this regard is the analogy between the partially written but uncodified British constitution and that of the EU. In order to create an analytical framework for EU constitutionalism that is based on British constitutionalism it is necessary to study the latter in some depth. This will then form the basis of the discussion that follows on how the British constitutional model can be applied to the EU.

Unlike the civil law jurisdictions of Europe, the United Kingdom does not have a formal, written text as its constitution. Instead the United Kingdom has a common-law constitution with parliamentary supremacy as its 'keystone'.²⁴ In orthodox theory of parliamentary supremacy,²⁵ parliament is seen as having legal sovereignty to pass any law,²⁶ with

²⁰ *ibid* p. 82.

²¹ Case 26/62, *Van Gend en Loos*, [1963] ECR 1; E. Stein, 'Lawyers, Judges and the making of a Transnational Constitution', (1981) 75 *American Journal of Comparative Law* 1.

²² F Snyder, *The Europeanization of Law*, (European Law Series, Hart Publishing, Oxford 2000) pp. 1-11; M Poiars Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 *International Journal of Constitutional Law* 332 at pp. 338-9.

²³ N Tsagourias (n 19) at p. 83.

²⁴ W Blackstone, *Commentaries on the Laws of England*, (Portland 1807); A V Dicey, *Introduction to the Study of the Laws of the Constitution*, (10th ed, Macmillan, London 1965) at p. 70.

²⁵ G Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *Law Q. Rev.* 591 at p. 597: 'nowhere is the development of this doctrine [of parliamentary supremacy] demonstrated more clearly than in the writings of Blackstone and Dicey'.

²⁶ W Blackstone (n 24) at p. 156: '[Parliament's authority is] so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.... It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament'.

political sovereignty resting with the electorate.²⁷ It is on this basis that parliament can be said to derive its moral legitimacy from democratic principles.²⁸ Dicey, the pre-eminent authority on British constitutional law, considered that these democratic principles could act as internal checks on the exercise of legislative power because parliament is unlikely to legislate contrary to fundamental ideals that are central to its belief system.²⁹ Such fundamental ideals in the British context would seem to be respect for representative government, democratic accountability and the rule of law.³⁰ However, despite these internal checks, nobody is legally competent, in the view of exponents of orthodox constitutional theory,³¹ to curtail the authority of parliament, not even the judiciary.

Prima facie, this notion of absolute parliamentary supremacy does not seem to accord with the modern view of constitutionalism, as outlined above, which seeks to limit the exercise of legislative power. Furthermore, the lack of possibility of judicial review of primary legislation passed by the British parliament³² does not seem to fully accord with the rule of law, which is said to be a fundamental principle of British constitutional law.³³ Orthodox constitutional theory is, however, only one interpretation of British constitutional law. The early colonists in America, for example, took a different view. They based the restraints on the exercise of parliamentary authority that emerged after the American Revolution on a different interpretation of the British common law.³⁴ This forms the basis of the strong power of judicial review that is vested in the American Supreme Court.³⁵

Many modern British constitutionalists³⁶ believe that the common law power of the courts to strike down executive acts that are *ultra vires*³⁷ could

²⁷ AV Dicey (n 24) at p. 73: 'The sovereign power under the English constitution is clearly 'Parliament.' But the word 'sovereignty' is sometimes employed in a political rather than strictly legal sense. That body is 'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested'.

²⁸ Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 New York University Law Review 1 at p. 13-14.

²⁹ AV Dicey (n 24) at p. 80.

³⁰ DW Vick, 'The Human Rights Act and the British Constitution' (2002) 37 Texas International Law Journal 329 at p. 330.

³¹ W Blackstone (n 24) at p. 91: '[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it'.

³² AW Bradley, 'The United Kingdom, the European Court of Human Rights, and Constitutional Review' (1995) 17 Carodozo Law Review 233 at pp. 233-34.

³³ DW Vick (n 30).

³⁴ B Bailyn, *The Ideological Origins of the American Revolution*, (OUP, Oxford 1967) at pp.30-31. These restraints on parliament were found in the common law principles that protected Englishmen from arbitrary or unchecked government authority.

³⁵ *Marbury v Madison*, 5 U.S. 137 (1803).

³⁶ TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, (Clarendon Press, Oxford 1993) at pp. 269-70; C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' 1996 Cambridge

be used as the basis for arguing the existence of a common law power of judicial review of primary legislative acts. As one writer puts it:³⁸

The ultra vires doctrine...is an independent common-law judicial power. This common-law position enhances the judiciary as an independent branch of government inherently capable of substantively scrutinizing executive acts, as well as the authorizing statute

Furthermore, this power of judicial review is not inconsistent with the doctrine of parliamentary sovereignty because parliament is theoretically capable of expressly revoking the court's power as it is with any common-law principle.³⁹ Similarly this extension of the court's inherent power of judicial review is in conformity with the natural law and rule of law limitations on parliament found in orthodox constitutional theory, as articulated by Blackstone and Dicey.⁴⁰ In a constitutional democracy, judicial review of both primary and secondary legislation, whilst not being a pre-requisite,⁴¹ is the most suitable means of ensuring legislative and executive compliance with constitutional limits.⁴² Therefore, this alternative view of British Constitutionalism, whilst firmly anchored in British common law,⁴³ is more in line with the constitutional arrangements of other EU member states in continental Europe.

In continental Europe, as in the United States of America, reference is made in the first instance to the text of a written constitution in order to determine the constitutional principles of a given country. Conversely, in Britain, constitutional principles were traditionally derived directly from the unwritten common-law.⁴⁴ However, written and unwritten elements are not mutually exclusive and both may be present in a constitutional system.⁴⁵ This is particularly evident in Britain where the lack of a formal constitution has not precluded reference to certain written documents which have a

Law Journal 122 at pp. 122-23; S De Smith et al., *Principles of Judicial Review*, (Sweet and Maxwell, London 1999) at p. 112-13; J Laws, 'Law and Democracy' 1995 Public Law 72 at p. 79.

³⁷ S De Smith et al. *ibid.*

³⁸ D Jenkins, 'From Unwritten to Written: Transformation in the British Common-Law Constitution' (2003) 36 Vanderbilt Journal of Transnational Law 863 at p. 879.

³⁹ A Halpin, 'The Theoretical Controversy Concerning Judicial Review' (2001) 64 MLR 500 at p. 501.

⁴⁰ P Craig, 'Competing Models of Judicial Review' 1999 Public Law 428 at p. 445.

⁴¹ D Grimm, 'Constitutional Adjudication and Democracy' in D W Jackson and C N Tate (eds) *Comparative Judicial Review and Public Policy Volume 77*, (Greenwood Press, Westport 1992) at p. 103.

⁴² A Stone, 'Abstract Constitutional Review and Policy Making in Western Europe' in D W Jackson and C N Tate *ibid.* at p. 41.

⁴³ D Jenkins, (n 38) at p. 880: 'This version of common-law review, compatible as it is with Coke, Blackstone, and Dicey, represents the resurgence of a theory of judicial review that has long roots in British legal history'.

⁴⁴ DA Strauss, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877 at p. 885.

⁴⁵ RH Fallon, *Implementing the Constitution*, (Harvard University Press, Cambridge MA 2001) at p. 111.

special constitutional status. Examples of such documents are the Parliament Act 1911,⁴⁶ the European Communities Act 1972,⁴⁷ the Scotland Act 1998⁴⁸ and the Human Rights Act 1998.⁴⁹ Presumably, any law instituting fixed-term parliaments, as the current UK coalition Government are proposing, would have a similar constitutional status. The importance of these statutes is not their legally binding force, because parliament can repeal them at any time, but rather their impact on UK Constitutionalism, due to their political entrenchment.⁵⁰

5. *A British Model of EU Constitutionalism*

The above account of UK constitutional law may seem somewhat tangential and out of place in this discussion of EU constitutionalism. However, this essay is an attempt to extend, by analogy, the principles of the British common-law constitution to that of the European Union. Therefore, it is essential to understand the core elements of the British constitution as a framework for this comparison.

It is quite striking, when examined in this manner, how many similarities there are between the constitutional arrangements of these two polities. Firstly, it is interesting to note that neither Britain nor the EU have a single text from which constitutional principles may be derived. However, both systems have several texts which have a special status and embody fundamental principles upon which each entity is founded.⁵¹ In addition to this, many of the constitutional principles which characterise the EU have been judge-made rather than being expressly referred to in the founding treaties.

In this analogy, there appears to be several direct comparisons that can be made between concepts of British constitutional law and practices within the European Union. The first striking example of this is the similarity between the notion of parliamentary supremacy, on the one hand, and the member states as 'masters of the treaties'⁵² on the other. As regards the former, legal supremacy is vested in the British Parliament in

⁴⁶ This statute set limits on the powers of the House of Lords in regard to legislation.

⁴⁷ This statute incorporated the Treaty Establishing the European Community (Treaty of Rome) and in so doing placed limitations on the principle of parliamentary sovereignty.

⁴⁸ This along with the Government of Wales Act 1998 and the Northern Ireland Act 1998 set out the principles for devolution.

⁴⁹ This acts almost like a bill of rights as it incorporates the ECHR directly into British domestic law.

⁵⁰ The nature of constitutional statutes was commented on by Lord Justice Laws in *Thoburn v Sunderland City Council* [2003] 3 WLR 247 and is discussed in R Hazell, 'Reinventing the Constitution: Can the State Survive?' 1999 Public Law 84 at pp. 84-87.

⁵¹ As regards the EU, such texts would include The Treaty on the functioning of the European Union and The Treaty on European Union.

⁵² *Brunner* (n 16).

Westminster,⁵³ and in the latter case, legal supremacy is vested in the member states acting collectively at an inter-governmental conference and through subsequent ratification.⁵⁴ Both bodies (Parliament and the IGC) have absolute legal sovereignty and are capable of passing any law they see fit.

In addition to this, there is a certain similarity between the evolution of constitutional principles in the British common-law and the teleological interpretation of the treaties by the European Court of Justice.⁵⁵ As Weiler demonstrates,⁵⁶ many of the main fundamental principles that define the European Union as a constitutional legal order were established by the ECJ. These include the doctrines of direct effect,⁵⁷ supremacy,⁵⁸ implied powers⁵⁹ and fundamental rights.⁶⁰ In Weiler's opinion:⁶¹

The measure of creative interpretation of the Treaty was so great as to be consonant with a self-image of a constitutional court in a 'constitutional' polity.

In the present author's opinion, this is a strong example of how the European Court of Justice derives constitutional principles directly from the *acquis communautaire*, which encompasses ECJ case-law and general principles as well as the treaties, rather than from any specific textual source. This seems to bear more similarity with the British common-law approach to constitutionalism than it does to the rigid textual approach of many continental European legal systems.

These judicially created, constitutional doctrines only have full effect, however, as a result of the Community's strong system of judicial review.⁶²

⁵³ Henceforth referred to simply as Parliament. This is short hand for the procedure whereby an act is approved not only by the House of Commons but also by the House of Lords and then receives Royal assent.

⁵⁴ Henceforth referred to simply as IGC. The procedure whereby treaties must be ratified by national parliaments after being signed at an IGC can be seen as somewhat analogous to the procedure in the British Parliament *ibid.*

⁵⁵ Henceforth referred to as the ECJ.

⁵⁶ JHH Weiler 'The Transformation of Europe' in JHH Weiler (ed) *The Constitution of Europe* (CUP, Cambridge 1999).

⁵⁷ Established in the landmark case 26/62 *Van Gend en Loos* [1963] ECR 1; As Weiler puts it: 'Community legal norms that are clear, precise and self-sufficient...must be regarded as the law of the land in the sphere of application of community law', JHH Weiler *ibid.* at p. 19.

⁵⁸ Established in Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; According to Weiler 'The combination of these two doctrines, [supremacy and direct effect], means that Community norms that produce direct effects are not merely the law of the land but the 'higher law' of the land'. JHH Weiler (n 56) at p. 22.

⁵⁹ It was recognised in Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263 (ERTA) that the existence of an internal competence implies an external, treaty-making power on the part of the Community.

⁶⁰ This doctrine was fully elaborated on in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle fur Getreide und Futtermittel* [1970] ECR 1125.

⁶¹ Weiler (n. 56) at p. 24.

⁶² Weiler (n 56) at p. 25: 'The constitutionalisation claim regarding the Treaties establishing the European Community can only be sustained by adding one more layer of analysis: the system of judicial remedies and enforcement'.

As mentioned previously,⁶³ judicial review is a key means of upholding constitutional principles. Similar to the above discussion about parliamentary supremacy, the lack of judicial review of the founding Treaties of the EU could be seen as undermining its constitutional nature. A solution to this problem can be found by looking to British constitutional theory. It is here that the in-depth discussion above, about the possibility of judicial review of primary legislation in the UK, is particularly relevant.

A central feature of the EC treaty is its strong system of judicial review of secondary legislation.⁶⁴ This seems very similar to the common-law power of the British courts to review *ultra vires* secondary legislation, which, as argued above, can be extended to justify the review of primary legislation. In the present writer's submission, the ECJ's power of judicial review of secondary legislation could be extended to allow judicial review of the treaties. This is, however, a controversial view and is not a power that the ECJ has claimed. Indeed, it would not be politically feasible for the ECJ to do so, given the opposition this would meet with from EU member states. Despite this, there is an argument to be made, based in constitutional theory, for the possible existence of such a power.

It is important to note that the Treaties of the EU neither expressly allow nor prohibit judicial review of primary legislation. Therefore, it would be very difficult to infer such a power based on textual references. However, as argued above, the treaties are not the definitive source of constitutional powers and principles but rather the embodiment of some of them. In this way, limitations exist on the supremacy of the will of the treaty makers, similar to those that exist on parliamentary sovereignty in Britain. One such limitation is the rule of law, on which the EU is said to be founded,⁶⁵ and central to which is some sort of power of judicial review of primary legislation.⁶⁶ An example of this in the British context is the ability of individuals whose rights are infringed (victims) to challenge primary legislative acts of the Scottish Parliament before the Court of Session and for that court to strike down those acts for violating the Human Rights Act 1998.⁶⁷ Whilst this is not the case with primary legislation of the Westminster parliament,⁶⁸ such a power is theoretically possible, as argued above. The

⁶³ A Stone (n 42).

⁶⁴ Article 230 EC provides that: 'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission...and acts of the Parliament intended to produce legal effects vis-a-vis third parties'.

⁶⁵ Article 6 TEU; Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1984] ECR 3325.

⁶⁶ Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *UPA* [2002] ECR I-6677: The Advocate General notes that Member States do not generally exclude individuals from challenging primary legislation which violates constitutionally enshrined rights or fundamental principles of law.

⁶⁷ Scotland Act 1998 s.29.

⁶⁸ The House of Lords only has the express statutory power to declare primary legislation of the Westminster Parliament incompatible with the Human Rights Act 1998 but not to invalidate it.

theoretical power of the ECJ to invalidate treaty provisions based on general principles of EU law gives weight to the submission that the EU is a constitutional polity with various constitutional documents, which give only partial expression to an underlying, unwritten constitutionalism rather than one possessing a formal written constitution.

6. The Lisbon Treaty: Another Constitutional Document

On an examination of the text of both documents, it seems that the substance of the Lisbon Treaty⁶⁹ is largely similar to that of, the now defunct, Treaty Establishing a Constitution for Europe (TECE),⁷⁰ in terms of the reforms it institutes.⁷¹ However, much of the symbolism of the TECE has not been reproduced in the Lisbon Treaty.⁷² More significant perhaps, is the fact that the term 'Constitution' appears nowhere in the text of the Lisbon Treaty. This seems indicative of the intention of the drafters of the treaty that it should not be perceived as a constitution after the failure of the TECE.⁷³

The Lisbon Treaty possesses several distinct features which are highly indicative of the fact that it is not a formal constitution as such. In addition to its lack of symbolism, the Lisbon treaty was not designed to stand alone but rather, merely, to amend the existing treaties. The net effect of these amendments may be very similar to that achieved by the TECE in substantive terms but the Lisbon Treaty does not create a single new constitutional document as the TECE would have done.

Furthermore, not only does the form of the Lisbon Treaty suggest that it is not a Constitution but also the manner in which it was adopted. In the vast majority⁷⁴ of member states, this treaty was adopted by the normal means of ratifying any other international treaty, namely parliamentary ratification. It is particularly noteworthy that those member states, whose referenda halted the ratification of the TECE,⁷⁵ also opted for parliamentary ratification of the Lisbon Treaty. This suggests that the Lisbon Treaty is no different from any other international treaty and certainly not a formal constitution.

A useful illustration of this point is a brief comparison between the respective constitutional amendment procedures in the United States of

⁶⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

⁷⁰ Treaty Establishing a Constitution for Europe [2004] OJ C316/1.

⁷¹ N Moussis, 'The Lisbon Treaty: A Constitution Without the Name', (2008) 3 *Revue du Marche Commun et de l'Union Europeenne* Issue 516 at pp. 161-168.

⁷² For example, there is no longer any reference to the symbols of unification such as the flag, the anthem and the day of Europe.

⁷³ G DeBúrca, 'Reflections on the EU's Path from the Constitutional Treaty to the Lisbon Treaty' Available at SSRN:

<http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1148448_code339387.pdf?abstractid=1124586&mirid=3> (accessed 13 July 2010).

⁷⁴ Ireland is constitutionally mandated to hold a referendum

⁷⁵ Namely France and the Netherlands.

America and in the United Kingdom. The U.S. Constitution is a formal written text and can only be amended through a special procedure distinct from the ordinary legislative procedure.⁷⁶ An analogous procedure in the context of the EU might be the adoption of a text resulting from a convention and its subsequent domestic ratification by referenda held in the various member states.

This contrasts starkly with the situation in the UK, where constitutional amendment has been effected through the passing, in the usual manner,⁷⁷ of ordinary legislative acts, which have nevertheless taken on a special constitutional and political significance.⁷⁸ The distinction between these two ways of amending a constitution is explained by Dicey:⁷⁹

When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing.... Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution.

Here Dicey is commenting specifically on the British Constitution. However, in the present writer's view, this can be extended to cover the EU too. Dicey seems to suggest an inversely proportional relationship between the flexibility of the amendment procedure of a constitution and the likelihood of the existence of a formal written constitution. This lends credibility to the assertion that the use of the ordinary adoption procedure for international treaties in the EU, when combined with other indicators outlined above, is indicative that the Lisbon Treaty is not a formal written constitution.

This, however, does not preclude the Lisbon Treaty from being a constitutionally and politically significant document. The reforms that the Lisbon Treaty introduces are wide ranging and will have a significant impact on the workings of the European Union. One of the most significant areas of reform is the powers of the institutions of the EU. Both the European Parliament and the ECJ have been given significantly more power. As regards the former, the ordinary legislative procedure⁸⁰ has been extended to cover more areas, giving the European Parliament a greater role to play in the adoption of legislation. This seems to come at the expense of

⁷⁶ Article V of the U.S. Constitution states that: 'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress...'.

⁷⁷ See (n 53).

⁷⁸ See (n 46 – 49) for examples.

⁷⁹ Dicey (n 24) at p. 90.

⁸⁰ Formerly known as the co decision procedure.

the member states acting in the Council because the extension of qualified majority voting to more areas allows the express wishes of the member states to be overridden to a greater extent. However, national parliaments have been given a more active role to play in the EU, for example through the use of the yellow and orange card procedure.⁸¹ The ECJ also gains greater influence through the extension of its jurisdiction into the area of justice and home affairs due to the merger of the third pillar with the first.

In addition to reforming the institutional balance within the EU, the Lisbon Treaty also enhances the protection of human rights. Firstly, the Lisbon Treaty makes the Charter of Fundamental Rights of the EU legally binding.⁸² Whilst this may not have the effect of creating any new rights it codifies and raises the profile of existing rights.⁸³ Furthermore, accession to the ECHR,⁸⁴ provided for in the Lisbon Treaty,⁸⁵ would ensure consistency between these two human rights regimes in Europe by subjecting the EU institutions to the jurisdiction of the European Court of Human Rights.⁸⁶ Altering the institutional balance and increasing the protection of human rights within the EU are merely prominent examples of the constitutional and political significance of the Lisbon Treaty. Other significant aspects include the express enunciation of the principle of conferred powers,⁸⁷ the granting of legal personality to the EU⁸⁸ and the restatement of the democratic principles that form the foundation of the EU.⁸⁹

Despite these far-reaching reforms of a constitutional nature, the Lisbon Treaty need not be considered a constitution as such but can still remain a constitutionally significant document, as recent reforms in the UK illustrate. Examples of such documents in the British context are the Constitutional Reform Act 2005 and the Human Rights Act 1998. Both these acts were passed under the normal legislative procedure in the UK; however both bear a high degree of constitutional significance. The former, introduces institutional reforms that have a fundamental impact on the separation of powers in the UK, as the Lisbon treaty does for the EU. The latter, whilst it may not introduce rights that were unavailable under the common-law, codifies them and makes ECHR rights justiciable before the UK courts, in a similar way that the Charter of Fundamental Rights and accession to the ECHR does for the EU. Therefore, by extension of British

⁸¹ These give national parliaments the right to express concerns on subsidiarity directly to the institution which initiated the proposed legislation.

⁸² Article 6 TEU (as amended by the Lisbon Treaty)

⁸³ K Lenaerts & E De Smijter, 'A 'Bill of Rights' for the European Union' 2001 Common Market Law Review at pp. 273-300.

⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

⁸⁵ Article 6 TEU (as amended by the Lisbon Treaty).

⁸⁶ S Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis' [2006] CMLR 43 629-665.

⁸⁷ Article 3(6) and 4(1) TEU (as amended by the Lisbon Treaty).

⁸⁸ Article 47 TEU (As inserted by the Lisbon Treaty).

⁸⁹ Article 2 TEU (as amended by the Lisbon Treaty).

common-law principles, the Lisbon Treaty can be seen as constitutionally significant whilst not being a constitution *per se*.

7. Conclusion

The institutions of the EU pass binding laws which have too fundamental an impact on the lives of individuals for this supranational entity not to have a constitution. The perceived lack of the ethno-cultural markers of a state constitution, such as a common language, heritage and culture, prove no bar to the existence of a transnational constitution for the EU. Such a constitution is novel and unique and not dependent on the precepts of state constitutionalism. Nevertheless, age-old constitutions, such as the British common-law constitution, can be helpful in determining how this new constitutional system ought to be perceived and interpreted. Due to its largely unwritten and uncodified form, the constitutional arrangements of the UK are sufficiently flexible to be capable of being adapted to serve as a model for the EU's constitution. On this reading, the EU neither needs nor has a written constitution. Instead, the EU has a composite constitution derived directly from the *acquis communautaire* of which the treaties merely form part. Therefore, despite its highly significant institutional and constitutional reforms, the Lisbon Treaty ranks as just another constitutional document, not a formal constitution.